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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

JOHN F. TIFFANY;
FEDERAL LAND BANK OF OMAHA, A CORPORATION; PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, INC., an Iowa corporation,

PETITIONERS,

vs.

FARM CREDIT BANK OF OMAHA f/k/a FEDERAL LAND BANK OF OMAHA, PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, and FEDERAL LAND BANK OF THE MIDLANDS,

RESPONDENTS.

TO THE SUPREME COURT OF IOWA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

IN A STATE COURT PROCEEDING WHERE THE RECORD FAILS TO DISCLOSE THAT ALLEGED ANTICOMPETITIVE CONDUCT BY A FEDERALLY CHARTERED INSTRUMENTALITY IS ACTIVELY SUPERVISED BY THE FEDERAL GOVERNMENT, AND THERE IS NO EVIDENCE THAT THE ACTIVITIES, INCLUDING THOSE UNLAWFUL AND EVEN CRIMINAL, ARE "EXPRESSLY REGULATED" BY ANY REGULATORY BODY OR OFFICER ACTING UNDER AUTHORITY OF THE UNITED STATES, AND INSTEAD, THE PLAINTIFFS SIMPLY RELY ON THE PROVISIONS OF 12 U.S.C. SECTION 2002(A), WHICH STATES THEY ARE "SUBJECT TO REGULATION" BY THE FARM CREDIT ADMINISTRATION, AND THERE IS NOTHING IN THE RECORD TO SHOW THEY ARE IN FACT REGULATED, ACTIVELY OR OTHERWISE, IS THE MERE PRESENCE OF SOME FEDERAL INVOLVEMENT OR MONITORING SUFFICIENT TO SUSTAIN EXEMPTION FROM STATE LAW. FACTS HERE INVOLVE THE OBVERSE OF PATRICK V. BURGET, 100 L.Ed.2d 83, 91. (1988) AND THE IOWA RESULT APPEARS DIRECTLY CONTRARY TO THE RULING OF THIS COURT IN THAT CASE.

LIST OF PARTIES

JOHN F. TIFFANY is an individual who participated as an incorporator of Iowa chartered entities appearing here as petitioners.

FEDERAL LAND BANK OF OMAHA, A CORPORATION is an Iowa chartered corporation appearing here as a petitioner.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS, INC. is an Iowa chartered corporation appearing here as a petitioner.

FARM CREDIT BANK OF OMAHA f/k/a FEDERAL LAND BANK OF OMAHA, was an entity federally chartered in 1987 to succeed to Federal Land Bank of Omaha, chartered in 1917 and cancelled on July 6, 1987. Such entities are named as respondents here.

PRODUCTION CREDIT ASSOCIATION OF THE MIDLANDS is an entity claiming to have

been chartered on January 16, 1986 as a result of a merger of all such associations in the Omaha District and who is named as a respondent here.

FEDERAL LAND BANK OF THE MIDLANDS is an entity claiming to have been chartered on December 31, 1988 as a result of a merger of all such associations in the Omaha District and who is named as a respondent here.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION 1

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 5

NATURE OF THE CASE 5

COURSE OF PROCEEDINGS 5

STATEMENT OF FACTS 7

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT . . 17

STANDARD OF REVIEW 17

REASONS SUPPORTING ISSUANCE OF WRIT 18

ISSUE 18

FEDERAL LAW FAVORS COMPETITION 19

ANTITRUST LAWS GENERALLY . . 21

MONOPOLY AND RESTRAINT OF TRADE 29

TYING ARRANGEMENTS . . . 34

REFUSAL TO DEAL . . . 40

RESPONDENTS COULD NOT QUALIFY FOR FOR EXEMPTION FROM IOWA LAW 41

CONCLUSION 52

APPENDIX

IOWA DISTRICT COURT

FEBRUARY 1, 1993 (JUDGE GOODE) . 1
FEBRUARY 5, 1993 (JUDGE GOODE) . 21
FEBRUARY 16,1993 (JUDGE GOODE) . 28
JULY 6, 1993 (JUDGE FINN) . . 30
AUGUST 46 (JUDGE FINN) . . . 46

IOWA SUPREME COURT DECISION OF MARCH 29, 1995 . . . 49

ORDER OF IOWA SUPREME COURT DENYING RECONSIDERATION OF APRIL 26, 1995 . 53

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Addyston Pipe & Steel v. U.S.,
175 U.S. 211 (1899) . . . 23

Allied Tube & Conduit Corp. v.
Indian Head, Inc.,
486 US 492, 499 (1987) . . 41

Business Electronic v. Sharp Electronics,
485 US 717, 723 (1987) . . 24

California v. ARC America Corp.,
490 US 93 (1989) . . . 41

Chevron U.S.A., Inc. v. Natural
Resources Defense Council, Inc.,
467 U.S. 837 (1984) . . 19

Fortner Enterprises, Inc. v. U.S.
Steel, 394 US 495 (1969) . . 38

FTC v. Superior Court Trial Lawyers
Ass'n, 493 US 411 (1989) . . 24

International Salt Co. v. U.S., 332 US
392 (1947) 38

LeBron v. Nat RR Passenger Ass'n,
___L.W.___ (2/23/95) . . 8

Mine Workers v. Pennington,
381 US 657 (1964) (NLRA) . . 46

Northern Pacific Ry v. Loew's Inc.,
356 US 1,6 (1958) . . . 38

Patrick v. Burget,

100 L.Ed.2d 83 (1988) . . 44

Perma Life Mufflers v.Inter. Parts Corp. 392 U.S. 134 (1968) . 23

Times-Picayune Publishing Co. v. U.S., 345 US 594, 608-09 (1953) 38

Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951) . . . 23

U.S. v. Griffith, 334 U.S. 100 (1947) 40

US v. Loew's, Inc., 371 US 38 (1962) 38

U.S. v. Olana, 113 S.Ct. 1770 (1993) 17

U.S. v. Paramount Pictures, 334 U.S. 131 (1948) . . . 30

U.S.v. Sealy, 388 U.S. 350 (1967) . 23

U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972) . . . 23

Wisconsin Dept of Industry v. Gould, Inc., 475 US 282 (1986) 41

UNITED STATES COURTS OF APPEALS

Bishop v. FICB Wichita, 908 F.2d 658 (CA 10 1990) . 10

Cuervo Resources, Inc. v. Claydesta Nat. Bank, 876 F.2d 436 (CA 5 1989) 22

First South PCA v. FCA, 926 F.2d 339 (CA 4 1991) . 19

Lessig v. Tidewater Oil Co.,
327 F.2d 459 (CA 9 1964) . 32

US v. Consol. Laundries Corp,
291 F.2d 563, 573 (CA 2 1961) . 32

UNITED STATES DISTRICT COURTS

FLB Jackson in Receivership v. FICB Miss,
727 F. Supp. 1055 (SD Miss 1989) 10

STATE COURTS

South Cent. Iowa PCA v. Scanlan,
380 N.W.2d 699, (1986) . . 8

CONSTITUTIONAL AND STATUTORY PROVISIONS

12 U.S.C. 2001 7

12 USC 2021 9

12 USC 2015(a) 29

12 USV 2021(a) & (b) . . . 29

12 USC 2015(b) 29

12 USC 1972 37

12 USC 2279c-1 51

12 USC 2279f-1 51

12 USC 2071(b)(2) 13

12 USC 2091(b)(2)(B) . . . 13

15 U.S.C. Sections 1-15 . . . 21

28 USC 1337 21

31 U.S.C. Section 9101 7

I.C.A. Section 553.2 21

I.C.A., Section 553.4 22

I.C.A. Section 553.5 22

I.C.A. Section 553.3(6) . . . 22

Iowa Code 553.12 23

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RESPONDENTS.

PETITION FOR CERTIORARI

Petitioners herein petition this Court to issue Writ of Certiorari to the Supreme Court of Iowa, to review and reverse the decisions below.

Petitioner respectfully suggests that this case is one which should be summarily returned to the Iowa Courts

with direction that Petitioner be allowed to develop and present his case on the merits.

OPINIONS BELOW

This petition seeks review of proceedings in the Iowa Courts which reached final decision thereby denying Petitioners relief by entry of an order by the Supreme Court of Iowa, dated April 26, 1995, which denied reconsideration en banc of its decision of March 29, 1995, sustaining exemption of Respondents from application of Iowa Anticompetition laws. Pertinent portions of such orders are attached.

JURISDICTION

The Jurisdiction of this Court is invoked pursuant to 28 USC Section 1257.

Iowa District Courts are courts of general jurisdiction under I.C.A. Chapter

602. All appeals in Iowa from final judgments are to the Iowa Supreme Court under Rule of Appellate Procedure 1 of that Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

I.C.A. Section 553.4. A contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market.

I.C.A. Section 553.5. A person shall not attempt to establish or establish, maintain, or use a monopoly of trade or commerce in a relevant market for the purpose of excluding competition or of controlling, fixing, or maintaining prices.

I.C.A. Section 553. Definitions. As used in this chapter unless the context otherwise requires:

3. "Government agency" means the state, its political subdivisions, any public agency supported in whole or in part by taxation.

4. "Person" means a natural person, estate, trust, enterprise or government agency.

I.C.A. Section 553.2. This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose of this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.

I.C.A. Section 553.6. This chapter shall not be construed to prohibit:

4. The activities or arrangements expressly approved or regulated by any regulatory body or officer action under authority of this state or of the United States.

STATEMENT OF THE CASE

NATURE OF THE CASE: This is a civil proceeding in the Iowa courts by Petitioners here against Respondents arising by way of a counterclaim and alleging that entities claiming to be federally-chartered had violated Iowa anticompetition laws by violating not only federal laws relating to their chartering but also by entering an illegal combination, engaging in prohibited tying arrangements, doing predatory acts, and engaging in other illegal acts, some of which are criminal. COURSE OF PROCEEDINGS: Petitioner Tiffany undertook to obtain federal charter for Farm Credit entities, or state entities to act as other financial institutions ("OFI's) with authority to act under the Farm Credit Act including

for the reason that existing entities were not fulfilling their mission. Existing Farm Credit entities sued Petitions here in the Iowa Courts for injunction. By way of one counterclaim, Petitioners alleged that Respondents were in violation of the Iowa Anticompetition law for illegal combination, tying, prohibited vertical monopoly, restraint, predatory acts, unlaw activity including some of criminal nature. In the face of sworn affidavits including one from a special aid to the Iowa Attorney General, a former District employee, a former Association employee, and others factually supporting the foregoing, and also venturing opinion that Respondents are not regulated on a day-to-day basis, the Iowa trial court found Respondents exempt from Iowa law and entered summary

judgment on their behalf. Respondents did not produce any showing that their activities or arrangements were expressly approved or actually regulated in fact by anyone for the United States.

STATEMENT OF FACTS: The Farm Credit System was created by Congress for making credit available to farmers and aquatic producers. First federal legislation occurred in 1916, with major amendments made in the law in 1971, 1985, and 1987. 12 U.S.C. 2001 et. seq.

It must be remembered that prior to the late sixties, Farm Credit entities enjoyed direct federal funding and for that reason were mixed-ownership corporations under 31 U.S.C. Sec. 9101. In the late sixties government ownership ended so that they become entirely privately-owned entities. This totally

changed their status, and cases before such change should be closely scrutinized and may be totally inapposite. South Cent. Ia PCA v. Scanlan, 380 N.W.2d 699, 703 (1986); See also LeBron v. Nat RR Passenger Ass'n, ___L.W.___ (2/23/95).

Following the removal of government ownership, the Farm Credit Act, was totally amended in 1971, and became the law under which federal Farm Credit entities operated and were chartered. The Farm Credit Administration (FCA) is part of the Executive Branch of United States Government which issues charters to Farm Credit entities. The Farm Credit Act of 1971 also authorizes direct lending to qualified borrowers by "Other Financial Institutions" (OFI's), which are not FCA-chartered.

A substantial change occurred with

the Farm Credit Act of 1987, fostering a renewed competition. Associations were to become direct lenders with the District supplying funds by discounting loans to them. The Farm Credit Board of the FCA also promulgated policy in favor of increased competition. The associations were to be autonomous borrower-owned and cooperatively-controlled direct lenders. 12 USC 2021. In this case, District did not allow this. It controlled their management, supplied them key personnel including legal counsel, paid all salaries, and made earnings from profits impossible.

Since 1968 all such entities are privately funded and instrumentalities of the United States for limited purposes, so that state courts have jurisdiction concerning matters in which they are

involved. South Central Iowa PCA v. Scanlan, 380 NW2d 699 (Iowa 1986). The Farm Credit Act does not preempt the field. Bishop v. FICB Wichita, 908 F.2d 658 (CA 10 1990). Farm Credit entities are not subject to any comprehensive federal preemption scheme, and state courts have jurisdiction concerning duties of System directors. FLB Jackson in Receivership v. FICB Miss, 727 F. Supp. 1055 (SD Miss 1989).

Prior to December of 1985, the Omaha District had within it 34 land bank associations, 37 production credit associations and over 40 other financial institutions. Because of the "farm crisis", Congress passed legislation which enabled the various land bank associations in the District to merge into one, and enabled the production

credit associations to merge into one. The independent boards of the various associations so voted. After enactment of the 1987 Farm Credit Act the District Land Bank and the Intermediate Credit Bank of each district were merged into one District Farm Credit Bank.

With the Farm Credit Act of 1987 Congress fostered a renewed competition making the associations direct lenders, with the district no longer making direct loans but merely supplying funds at discount to the associations.

Under 12 U.S.C. 2001 District Banks and the Associations are required to be borrower-owned, democratically-run cooperatives. The members are to control the associations which in turn control the District. An exception was the "other financial institutions" which were not

borrower-owned or cooperatively run.

The Farm Credit Administration is an independent agency inside of the Executive Branch of the United States Government. Under federal law it chartered the various Farm Credit System entities. It also promulgates federal regulations setting general parameters and guidelines within which the Farm Credit System entities are to operate. It does not supervise, regulate or become involved with the operations of such entities on a day to day basis.

Tiffany began the process of attempting to obtain Charter as a Farm Credit Association from the Farm Credit Adminstration. In doing so, it was necessary that he obtain the cooperation and technical assistance from the Farm Credit Bank in Omaha, which had an

affirmative duty under law to render him technical assistance and cooperation. Pursuant to recommendation of the Farm Credit Administration, and as required by statute (12 USC 2071(b)(2) and 12 USC 2091(b)(2)(B), Tiffany sought advice from Omaha Credit Bank of Omaha concerning applications to be made and procedures to be followed in the chartering of a new association. He was informed by the executive secretary of the CEO of Farm Credit Bank of Omaha that his written request had been referred to the president of the existing Associations for consideration by him. Thus, District, which was improperly continuing the making of direct loans (improperly withholding this from the Associations under District's total control), referred his request concerning

a new charter to another Association in the District (who under law would be a direct competitor). (Akin to having a request to General Motors for franchise to sell Buicks referred to another local Buick dealer for consideration!)

At the same time, Farm Credit Bank in Omaha had a vested countervailing interest (contrary to Farm Credit Policy and Regulations) in not assisting a new association for the reason that such association would be in actual competition with it at the retail level. (It was still improperly making direct loans).

Although existing Associations were to be separate, independent and autonomous farmer-owned, democratically-run cooperatives, (12 U.S.C. 2001) the Farm Credit Bank of Omaha refused them

their independence. Preparatory to seeking EITHER federal association charter, OR, "other financial institution" status Tiffany participated in the formation of various Iowa corporations. He made numerous trips to Washington, D.C., corresponded with members of Congress and the Farm Credit Bank of Omaha and with personnel inside the Farm Credit Administration.

The Farm Credit Administration made it clear to organizers that obtaining of FCA charter would require the cooperative effort of the Omaha Farm Credit Bank. FCA directed that the organizers communicate directly with Omaha and elicit cooperation in obtaining the new charter. Omaha refused such cooperation, stating that no need existed. (In response, organizers conducted a search

of all new Iowa UCC filings for operational loans for the State for several years. That search disclosed that Farm Credit Entities were not expanding credit to fill need, and that in fact only 1 to 1.5 new customers per county were being added per year). Instead of cooperating, for reasons entirely selfish to its managers, with total disregard for Iowa farmers needing credit and in the face of the mandate of clear federal law, Omaha District, on its own, and without even the knowledge of the President of the Associations, on their behalf brought this action. This stopped the organizational effort. Omaha District also continued the prohibited practices and the illegal activity which caused the organizers to create a new entity in the first place.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

The issues involved are of exceptional character and of great public importance in that they address whether Farm Credit entities claiming to be federally chartered are subject to such federal regulation and control that their acts, even those unlawful and/or of criminal nature, are sufficiently tantamount to acts of the federal government that they may claim exemption from state anticompetitive laws.

STANDARD OF REVIEW. This Petition is based upon plain errors concerning federal law made by the Iowa Courts and is de novo. U.S. v. Olana, 113 S.Ct. 1770, 1776-79 (1993).

REASONS SUPPORTING ISSUANCE OF THE WRIT

I. IT WAS CONTRARY TO LAW FOR THE IOWA COURT TO ALLOW SUMMARY JUDGMENT OF EXEMPTION TO STAND IN THE FACE OF ALLEGATIONS AND FACTUAL SHOWING OF ILLEGAL COMBINATION, ACTIONS UNDERTAKEN IN VIOLATION OF FEDERAL CHARTERING LAWS AND OTHER UNLAWFUL ACTIVITIES INCLUDING THOSE OF CRIMINAL NATURE, CONCERNING FEDERALLY-CHARTERED INSTRUMENTALITIES OF THE UNITED STATES CLAIMING EXEMPTION FROM APPLICATION OF IOWA ANTICOMPETITION LAWS MERELY BY CLAIMING THAT SUCH ACTIVITIES OR ARRANGEMENTS WERE SUBJECT TO REGULATION BY A REGULATORY BODY OR OFFICER OF THE UNITED STATES.

THERE WAS CLEAR VIOLATION OF IOWA LAW. In the Farm Credit Act of 1987 Congress mandated that renewed competition be fostered. Thereafter direct lending was

to be done by the associations. 12 USC 2021. The Farm Credit Adminstration could not promulgate regulations contradicting the statutes. First South Production Credit Association v. Farm Credit Administration, 926 F.2d 339 (CA 4 1991); citing, Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

Petitioners supplied to the Iowa Courts facts supporting, at minimum, three different theories of violation of Iowa anti-trust law, i.e., 1. vertical merger, 2. predatory acts, including tying, and, 3. refusal to deal.

FEDERAL LAW FAVORS COMPETITION. Tiffany gave affidavit that he had personally spoken with Senator Grassley, or his aides, on several occasions concerning the proposed application for a new farm

credit charter for the state of Iowa. Following one of these conferences, he was personally present during the sworn testimony given by Harold B. Steele, Chairman and CEO of the Farm Credit Administration to the Senate Committee on Appropriations, Subcommittee on Agriculture, Rural Development and Related Agencies, March 21, 1990. He personally heard such testimony, the transcript of which states on page 83:

> "Senator Grassley: Well, are you saying that it is not a policy of the board to have competition?
>
> Mr. Steele: Internal competition is one thing, lots of competition for the farmer. So the farmer has the opportunity through competition to the Farm Credit System on the one hand, and through the commercial banks, insurance companies and others on the other hand."

That testimony is also consistent with the announced FCA policy statement

favoring competition.

ANTI-TRUST LAWS GENERALLY. The Federal anti-trust laws concerned are primarily the Sherman Act and the Clayton Act found in 15 U.S.C. Sections 1-15. Jurisdiction concerning criminal and civil application of federal anti-trust laws relating to interstate commerce and are within the original, exclusive jurisdiction of the federal courts (eg. 28 USC 1337). The Iowa Legislature enacted Chapter 553 concerning intra-state commerce. ICA 553.2 expressly directs that the chapter be construed to complement and harmonize with the applied laws of the United States. Such section makes the Sherman Act, the Clayton Act and the court decisions thereunder directly pertinent to state cases.

The underlying purposes of the anti-

trust laws is the protection of the public interest to free competition. Certain activities are illegal per se, and such prima facie showing shifts the burden of proof to the defendant.

State courts have concurrent jurisdiction to hear claims arising under the anti-tying provisions of the Bank Holding Company Act. Cuervo Resources, Inc. v. Claydesta Nat. Bank, 876 F.2d 436 (CA 5 1989).

A contract, combination or conspiracy to restrain or monopolize trade or commerce in a relevant market is illegal. I.C.A., Section 553.4 and 553.5. "Relevant market" is the geographical area of actual or potential competition in a line of commerce. I.C.A. Section 553.3(6). Any agreement (explicit or tacit) to control or divide competition

among those agreeing is illegal per se. Addyston Pipe & Steel v. U.S., 175 U.S. 211 (1899). There is no justification or defense for such agreements. U.S. v. Topco Associates, Inc., 405 U.S. 596 (1972). Timken Roller Bearing Co. v. U.S., 341 U.S. 593 (1951). The foregoing proscription applies to direct and indirect agreements. U.S.v. Sealy, 388 U.S. 350 (1967). A person threatened by such injury or conduct has a remedy. Iowa Code 553.12. "Person" includes "enterprise". "Enterprise" includes "corporation". Iowa Code 553.3. The community is best served through enforcement of such laws which pose "an ever present threat" to violators. Perma Life Mufflers v.Inter. Parts Corp. 392 U.S. 134 (1968).

VERTICAL MERGER. Vertical combinations are illegal per se where the effect of

the combination is obvious. Otherwise, illegality is determined through a case-by-case application of the so-called rule of reason wherein the fact-finder makes determination. Business Electronic v. Sharp Electronics, 485 US 717, 723 (1987); FTC v. Superior Court Trial Lawyers Ass'n, 493 US 411 (1989).

Congress intended that the Associations be borrower-owned and democratically-controlled entities, which in turn control the District by exercise of the ballot box. Instead, management decisions critical to the Associations were usurped by District. A glaring example in this litigation is the fact that the Associations do not have independent counsel.

The associations should have been offended by the control being exerted

over them, but they did not have officials, including counsel, sufficiently independent to be offended! The President of both associations, Gale Cameron, disclosed that he had no knowledge that this very litigation was being instituted.

The sworn testimony of Gary Nagle disclosed that he was authorized to act for both the District and the Associations interchangeably and without apparent restriction. In a case called Farm Credit Bank of Omaha vs First Farlin Company, et. al., Iowa District Court for Boone County, No. 32611, he swore that:

> a. At page 5, that his official title with "Farm Credit Services" was "Assistant vice president" in charge of "acquired property."
>
> b. At page 6: "A I work for the bank in Omaha."
> Q Okay.
> A I work out of Storm Lake as a location.

Q So you work for the district bank at Omaha?
A Right."

c. At page 78: "Q Who issues your pay check?
A Farm Credit Services.
* * * *
Q And to your knowledge is it an Association check or is it a Farm Credit Bank check.
A Farm Credit Bank check.
Q And so your employment is directly with the Farm Credit Bank of Omaha?
A That's correct.
Q Not with the Association?
A That's correct."

d. At page 79: "Q At the Storm Lake office where you work, whose office is it?
A It's just a branch office.
Q Branch lending office?
A Yes
Q Whose branch lending office?
A Well, it's all under the Farm Credit Bank of Omaha, and underneath that you've got PCA and Federal Land Bank.
Q. And they all office in the same office?
A. Right."

e. At page 83-84 (concerning the signing of a deed by the witness wherein "Farm Credit Bank of Omaha" is shown as grantor:

"Q Who are you acting for? You

signed that were you acting for when you signed it?

A I'm acting for both Farm Credit Bank of Omaha as a grantor, and Federal Land Bank Association of the Midlands is who I am acting upon."

Continuing at page 88 on the same subject matter:

"Q So again, to return to my question, at the time that you signed the deed, which is located on page 40 -- a photocopy of this is located at page 40-- which was apparently recorded at 633, page 537, Boone County, Iowa, who do you think you were representing when you signed that deed?

A I'm representing both entities. (Emphasis added).

Q Both entities being who?

A Farm Credit Bank of Omaha and Federal Land Bank Association of the Midlands."

f. At page 92-93: "Q We're calling your attention to the property we've been discussing in Section 25 of Grant Township as portrayed in Exhibit 1. Did you execute a deed on behalf of Production Credit Associations of the Midlands?

A. I believe so, yes."

* * * *

Q But you were the only one that signed that deed, and you were acting for the Production Credit Association of the Midlands?

A That's correct."

Sue Atkinson, former Association employee in charge of bookkeeping, and intimately familiar with operation of Association and District, gave affidavit that Omaha District was clearly not following the law and FCA policy when it retained all lending in the District, to the exclusion of the Associations, and also that FCA regulation was of very limited nature:

> "Based upon by (sic) experience, the Farm Credit Administration was involved primarily with the chartering of entities, auditing the books, and reviewing certain loans where, for example, extremely large amounts were concerned or where a director was concerned creating possible conflicts of interest."

Hearings concerning legislation passed later (Farm Credit Act of 1987) demonstrate that Congress was concerned that renewed competition be fostered, and

that the associations should become the new direct lenders, and that the district "shall" make loans through the associations and make direct loans only when no association exists to do so. (12 USC 2021(a) & (b).

Concerning land loans, under 12 USC 2015(a); 2021(a) & (b), District was to assist or discount for the association which is to make the loans. Concerning operating loans, under 12 USC 2015(b) the district was to discount paper to the production credit associations or "other financial institutions".

MONOPOLY AND RESTRAINT OF TRADE. Monopoly can result from merger or combination which can be horizonal, vertical or conglomerate.

Monopoly can be proven in various ways, some of which are: control over

prices; actual exclusion of competitors; power over relevant market; relative size and strength of competitors; freedom of entry; pricing trends and practices; profits; consumer demands; control over supply, or entry. A primary factor continues to be the total market share of the alleged monopolist.

Monopoly can result from combination. Companies do not combine or conspire without an intent to make use of the power they thereby obtain. Such can be obtained by horizonal or vertical combination. Both were involved in U.S. v. Paramount Pictures, 334 U.S. 131 (1948). This Court stated that legality of vertical integration under the Sherman Act turns upon (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant

purpose or intent. A vertically integrated enterprise violates Sherman Act if it is a calculated scheme to gain control over an appreciable segment of the market, or if it is a calculated scheme to exclude competition. Evidence to prevent competition is evidence of purpose and intent. Nature of the market and leverage in the industry are also factors.

In addition to monopolization, Section 2 of the Sherman Act also makes illegal the attempt to monopolize, whether by an individual firm, by combination or conspiracy. Even though the power of an individual firm or combination over the relevant market may fall short of monopoly, exclusionary or predatory conduct may constitute unlawful attempt to monopolize if (1) there is

intent to monopolize and (2) there is dangerous probability that the attempt would be successful. In attempt cases, establishment of the relevant market is not necessary and only some appreciable part of commerce is necessary. US v. Consol. Laundries Corp, 291 F.2d 563, 573 (CA 2 1961); Lessig v. Tidewater Oil Co., 327 F.2d 459 (CA 9 1964).

Section 7 of the Sherman Act prohibits certain vertical integrations which might have the effect of lessening competition or of creating a monopoly.

Section 8 of the Sherman Act prohibits certain interlocking activities of private bankers or certain directors, officers or employees of competing corporations other than banks. Personnel of District and the Associations were so interlocked and

interchangeable that actions by one are not distinguishable from acts of the other. Offices of District and the Associations were shared, with no autonomy for the Associations. The ultimate controlling factor - payment of payroll - was done directly by District. All of this in turn is clear showing of vertical merger, which is illegal pe se. District and associations have interlocking: (a) personnel with interchangeable functions; (b) legal counsel; (c) checkbook; (d) offices; (e) facilities; and (f) files.

The published Quarterly Financial Report of the Farm Credit Bank of Omaha and related Associations of March 31, 1991 stated:

> " The Farm Credit Bank of Omaha and related Associations is comprised of the Farm Credit Bank of Omaha (FCBO) combined with the

> Federal Land Bank Association of the Midlands (FLBAM) and the Production Credit Association of the Midlands (PCAM). The combined FCBO, FLBAM and PCAM are referred to herein as the FCBO and related Associations, and the Eighth Farm Credit District is referred to herein as District." (emphasis added).

The Annual Report for 1991 is prefaced with the same admission of fact.

Such admitted "combination" is unequivocally a vertical merger which obviously reduces competition. (Illegal per se). Plaintiffs did not, and could not, assert any authorization for such illegal vertical merger of two entities intended under law to be separate and distinct entities, with each having separate and opposing functions.

TYING ARRANGEMENTS. The Farm Credit Bank of Omaha implemented policy that all sales of inventory property would be on credit only basis with financing through

it only. A memorandum, dated August 1, 1988, signed by L.W. Mechem, before the Court, included the following statement:

> "Effective immediately, all sales of inventory property are to be financed by us only. Cash offers will generally be refused. Omaha is making this change to re-build a quality portfolio of accruing loans."

This was a tying arrangement in which a sale from one market (land) is tied to a sale in another market (credit). Such "tying" policy was, at minimum, prima facie evidence of tending to restrain trade and/or establish monopoly, and by some considered illegal per se.

Such policy is directly contrary to affirmative laws concerning conduct of Farm Credit entities, and as such it is also a predatory act. It prevents the former owner from being able to exercise his statutory right of first refusal for

the reason that he cannot be an approved Farm Credit borrower with Farm Credit financing, and he cannot pay cash by utilizing another lender, because cash sales are forbidden.

Such memorandum also demonstrates an additional predatory act in that a substantial pre-payment penalty is imposed unless the repayment is "paid out of a new Farm Credit System loan".

A tying arrangement can be found under four tests. It may be unlawful under Section 3 of the Clayton Act where the seller enjoys monopolistic position for the tying product, or if a substantial volume of commerce in the tied product is restrained. It will be per se unlawful under the Sherman Act, and even more so under the Clayton Act when the characteristics of the tying

product give the seller sufficient economic power to control prices or impose burdensome terms with any appreciable number of buyers and a not insubstantial dollar volume of commerce in the tied product is affected. If the arrangement does not meet any of the foregoing tests, it may still be violative of Section 1 of the Sherman Act under the rule of reason. If the seller is a bank, then the more stringent anti-tying provisions of 12 USC 1972 apply.

When the seller enjoys a monopolistic position in the market for the "tying" product, or a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards of Section 3 of the Clayton Act because from either factor the requisite

potential lessening of competition is inferred. When both conditions are met, a tying arrangement is banned by Section 1 of the Sherman Act. These are the standards for a finding of per se illegality. Times-Picayune Publishing Co. v. U.S., 345 US 594, 608-09 (1953). In International Salt Co. v. U.S., 332 US 392 (1947) to Fortner Enterprises, Inc. v. U.S. Steel, 394 US 495 (1969) this Court progressively lessened the requirements for showing per se illegality. In Northern Pacific Ry v. Loew's Inc., 356 US 1,6 (1958) the Court found that tying arrangements may violate the Sherman Act if the defendant had "sufficient economic power" in the tying product to produce "an appreciable restraint" in the market for the tied product. The defendant there had

required buyers and lessees of its land to ship produce from such lands on its rails. The Court relied in part in forming its presumption upon the unique nature of the lands. In US v. Loew's, Inc., 371 US 38 (1962) such uniqueness was found from holding of copyright.

One focus of concern is whether the seller has power to raise prices, or to impose other burdensome terms such as a tie-in to any appreciable number of buyers. Fortner Enterprises, Inc. v. U.S., 394 US 495 (1969). That case involved conditioned granting of loans. The Court relied upon whether a not insubstantial restraint upon commerce had occurred and making this determination relied upon dollar volume in the tied product. In International Salt Co v. US, 332 US 495 (1969) found $500,000. in the

tied product to be sufficient. In US v. Loew's, Inc., 371 US 38 (1962) the Court found that $60,800. was "not insubstantial" for purposes of per se illegality. In Fortner Enterprises, Inc. v. U.S. Steel, 394 US 495, 502 (1969) the Court found that the relevant figure is the total volume of sales tied by the sales policy, and not the portion of this total accounted for by the particular plaintiff who brings the action.

REFUSAL TO DEAL. In seeking charter, the FCA directed Tiffany to the District. District refused to render any assistance, as is it's duty under law. Instead it referred the request to the President of the Associations. Decisions of this Court, including U.S. v. Griffith, 334 U.S. 100, 107 (1947) hold that the power to exclude competition,

and to foreclose competitors from any substantial market is unreasonable per se, and that use of monopoly power, even if lawfully obtained, to foreclose competition, or destroy a competitor is unlawful.

RESPONDENTS COULD NOT QUALIFY FOR ANY EXEMPTION FROM IOWA LAW.

Federal law can sometimes pre-empt state regulation. Wisconsin Dept of Industry v. Gould, Inc., 475 US 282 (1986). Federal anti-trust laws do not pre-empt state anti-trust laws. California v. ARC America Corp., 490 US 93 (1989). A restraint of trade or monopolization is immune ONLY when it is the result of valid governmental action, and this varies with the nature and context of the activity (factual determinations). Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 US 492,

499 (1987). No federal statute authorizes a merger of the District and Association levels as has been done by the Respondents by their own admission.

The scope of any exemption allowing restraint or monopolization of trade because done pursuant to governmental auspices depends upon the "source, context, and nature of the anti-competitive restraint at issue", which are issues of fact for the fact finder considering such affirmative defense. Allied Tube, id., 486 US 492, 499 (1987). While a government may be presumed to act in the public interest, a private party (such as the Farm Credit entities here the Respondents) "may be presumed to be acting primarily on his or its own behalf." Allied, Id., 501.

On January 29, 1993, the Honorable

Allan L. Goode of the Iowa District Court entered order granting summary judgment upon this counterclaim finding that Plaintiffs are exempt or immune. On February 3, 1993, he sua sponte modified his earlier order of January 29, 1993, based upon the "rigorous two-pronged test" set by this Court; and overruled the motion for summary judgment (which he had earlier granted), finding that:

> "Here the record fails to disclose that the alleged anticompetitive conduct is actively supervised by the federal government. Nor is there any evidence, in the language of 553.6(4), that the activities are "expressly regulated" by any regulatory body or officer acting under authority of the United States. Instead, the Plaintiffs simply rely on the provisions of 12 U.S.C. Section 2002(a), which states they are "subject to regulation" by the Farm Credit Administration. There is nothing in the record to show they are in fact regulated, actively or otherwise. And, although the farm credit entities may be subject to some regulation,

> the mere presence of some federal involvement or monitoring does not suffice. Patrick v. Burget, 100 L.Ed.2d 83, 91. (1988)"

The Plaintiffs had the burden of proof concerning their affirmative defense of exemption or immunity. To obtain summary judgment as a matter of law upon their affirmative defense that their acts are exempt or immune (because they are governmental in nature or under direct governmental control), the Plaintiffs had to show that either there is no issue of fact, or that a jury could not make reasonable inference otherwise. As Judge Goode correctly noted in his ruling of February 3, 1993, that to show immunity, Plaintiffs' conduct must have rigorously followed:

> a. "clearly articulated and affirmatively expressed" governmental policy; and as the United State Supreme Court has observed, when privately owned

> entities (such as Plaintiffs) are concerned, the presumption is that they are acting to advance their own, and not the government's interest. Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1987). (Such presumption) puts upon them the BURDEN of coming forth with FACTUAL SHOWING to rebut such presumption).
>
> b. any anticompetitive conduct must have been "actively supervised" by the government itself (This requires a FACTUAL showing).

Judge Finn, also of the Iowa District Court, reviewed the regulations submitted by the Plaintiffs. Most, if not all, were those of 1985. Some related to the merger of the District Banks - a merger required by statute and never in issue. It had nothing to do with the lawsuit! Based upon those regulations he dismissed the counterclaim on the basis that the mergers were regulated and thus immune. With due respect, that finding is patently absurd. It is absurd for the

reason that the merger he impliedly approved is contrary to federal statute. It is patently absurd because actions contrary to law are invalid and certainly not immune or exempt. Activities ostensibly done under auspices of law may also be violative of anti-trust provisions when improper and ulterior motive is the controlling factor. Mine Workers v. Pennington, 381 US 657 (1964) (NLRA). The ruling also totally ignored statement of facts before the Court showing that:

(1) Affidavit Keith McGruder, a former District employee: "Affiant asserts officials of FCBO and their related entities are not regulated in their day-to-day operations and actions. Affiant believes day-to-day actions and operations of FCBO officials are

discretionary with the Acting Official."

(2) Affidavit of Charles G. Rutenbeck, special aide to the Iowa Attorney General, after giving his basis for knowledge, stating "I formed the distinct impression and opinion that Omaha District office was not regulated on any regular or day-to-day basis; and that the only actions which might approach "regulation" involving the FCA, concerned, and ended with, those matters necessarily involved in the original chartering of the individual associations."

(3) "The Federal Board believes these commentators have <u>incorrectly read</u> the proposed regulation as authorizing the Governor <u>to require</u> merger or consolidation of associations through charter amendments. While the Act

specifically authorizes the Governor to approve association charter amendments at his own initiate ..., this authority does not include the power to merge or consolidate associations." Federal Register, p. 20397. (Emphasis added).

(4) "Associations are privately owned and operated institutions. Stockholders have the responsibility to make their own informed business judgment on whether to vote for a given proposal."

(5) Final approval by FCA before stockholder decision, "would unnecessarily restrict the right of stockholders to alter a proposal as presented . . . ." Federal Register, p. 20398, attached to Plaintiffs' Supplemental Record.

(6) Sworn testimony of Gale D.

Cameron, President and CEO of both Associations, taken September 19, 1989:

At p. 22: "Q. Does -- who, rather, examines the transactions and books of the Production Credit Association and the Land Bank Association?

A. Well, first of all, the Farm Credit Administration, through their regulatory process, carries out an examination of the PCA of the Midlands and FLBA of the Midlands on an annual basis. In addition to that, the Farm Credit Bank carries out a--through its quality control function carries out a review of the credit portfolio on an annual basis; and in addition to that, at the present time the associations have contracted with Price Waterhouse to carry out a financial and internal audit function of the PCA and FLBA.

At p. 23. "Q. Okay. Since you contract outside examiners -

A. That's correct.

Q. -- you don't have your own internal examiner?

(Witness shook head negatively.)"

At p. 37 "Q. Is there a proviso in the Farm Credit Act of 1987 which allows the creation of new associations inside a district?

A. I just don't recall correctly.

> If there is, it would have probably been similar to what was in the act previously."
>
> At p. 24 concerning FCA: "Q Were they instrumental in utilization of that supervisory capacity in effecting the mergers that we talked about earlier of the 37 Production Credit Associations?
>
> A. Well, to the best of my recollection, their primary involvement from a supervisory standpoint in the merger effort was to consider and sign off on the proposal from the -- whoever was requesting the merger.
>
> Q. They were not a motivating force in effecting such mergers, in your opinion?
>
> A. No."

Mere conclusory characterization as "regulated" is not sufficient - factual demonstration is necessary that the claimed regulator has, and exercises, the power to review such party's actions; the burden rests upon the parties who seek application of this affirmative defense of exemption; and the determination is

one of FACT, not of LAW. Patrick, id.

In the fourth paragraph the Court found that 2279c-1 and 2279f-1 "clearly express" the federal government's policy that the associations in a district "should" merge. In fact, 12 USC 2279c-1 provides two or more associations "may" merge if a majority of the shareholders of each so vote and the District Bank and FCA approve. 2279f-1 provides associations "may voluntarily" merge if the shareholders so vote and the District Bank and FCA approve.

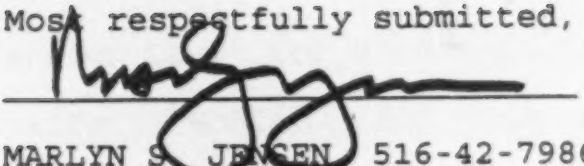
The 1985 regulation relied upon by the Iowa District Court makes clear that the FCA regulations were intended to provide to the stockholders of the associations the financial information necessary for them to decide on whether or not to merge. That regulation also

makes clear that control of the destiny of the associations is to be with the management of the associations, not with district. The actual vertical merger of District into the associations was clearly violative of that policy. To claim purported exemption from such regulation is patently absurd. It is an application of federal law not stated and not intended.

CONCLUSION

WHEREFORE Petitioner prays the Court issue Writ of Certiorari to the Iowa Supreme Court and order and direct that it vacate it's order affirming the granting of summary judgment adverse to Petitioner and take those actions and issue those orders incidental to requiring that this matter be submitted to a trial by jury on the merits.

Most respectfully submitted,



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ATTORNEY FOR PETITIONERS.

Order filed Feb 1, 1993
Clerk of District Court for Greene County

"Plaintiffs' Motion for Summary Judgment (8-7-92) in the above action became before the Court for hearing on the 8th day of October, 1992.

Kevin M. Reynolds appeared on behalf of the Plaintiffs.

Marlyn S. Jensen appeared for Defendants.

At the conclusion of the hearing, the Court indicated that leave would be granted for Plaintiffs to amend their answer to Defendants' Seventh Counterclaim to allege the exemption set forth in Iowa Code Sec 553.6(4). The amendment was filed October 15, 1992.

Leave was also granted for the Defendants to pursue additional discovery with respect to the amendment, which was to be completed by December 7, 1992. No

further discovery was conducted and the motion was submitted on December 18, 1992, the deadline for filing proposed Findings of Fact and Conclusions of Law.

The petition was filed on October 21, 1987, over five years ago. In substance, the Plaintiffs commenced suit to enjoin Defendants from using certain business names that are deceptively similar to theirs. Unfortunately, as noted in a prior order, the case "escalated into a tedious slate of federal and constitutional claims, spiced with combative and time consuming motions." See, Order (Hon. Mark S. Cady) filed 12-1-89.

On February 8, 1991, the Honorable Gary L. McMinimee entered an order granting partial summary judgment which disposed of most of the claims, including

several affirmative defenses and counterclaims. The order specifically enjoined the corporate Defendants "from using, for any purpose whatsoever, the names Federal Land Bank of Omaha, Production Credit Association of the Midlands, Federal Land Bank Association of Perry, and Federal Land Bank of the Midlands, Inc., or any other name similar to any farm credit bank, or predecessor federal land bank, federal land bank association, or production credit association."

The only remaining substantive issues are: (1) Plaintiffs' claim for injunctive relief against Defendant John F. Tiffany; (2) Defendants' Seventh Counterclaim (Iowa Competition Law); and Defendants' alleged affirmative defense that Plaintiffs' counsel does not have

proper authority to prosecute the proceeding.

FACTS

Plaintiffs Farm Credit Bank of Omaha, Production Credit Association of the Midlands are members of the Farm Credit System.

Before 1988, the Farm Credit System included land banks, land bank associations, intermediate credit banks, and production credit associations.

Pursuant to the 1988 reorganization, the federal land bank and intermediate credit bank of each credit system were merged into a farm credit bank, a federally chartered instrumentality. Production credit associations and land bank associations continued as federal instrumentalities. The reorganization further provided for the revocation of

the charter of the Farm Credit System Capital Corporation and established the Farm Credit Assistance Board, which succeeded to the assets and obligations of its predecessor.

Plaintiff Production Credit Association of the Midlands was formed on January 1, 1986, by the merger of 37 production credit associations in several states, including those in Iowa. Plaintiff Federal Land Bank Association of the Midlands was formed January 1, 1989, by the merger of 31 federal land bank associations in several states, including Iowa. Plaintiff Farm Credit Bank of Omaha was established on July 6, 1988, pursuant to the merger of the Federal Intermediate Credit Bank of Omaha and the Federal Land Bank of Omaha, which was originally chartered in 1917.

Defendant Production Credit Association of the Midlands, Inc., an Iowa corporation, was incorporated by Defendant John F. Tiffany on April 25, 1986. On July 14, 1986, Defendant Federal Land Bank of Omaha was incorporated in Iowa by Defendant Tiffany as incorporated. Both corporations, through Defendant Tiffany, filed documents with the Iowa Secretary of State to obtain the purported right to use the following names: Production Credit Association of the Midlands, Federal Lank Bank Association of the Midlands, Farm Credit System Capital Corporation, Farm Credit Services, and Farm Credit Services, Inc.

Defendant Tiffany has caused at least one advertisement to run in the Des Moines Register noting his mailing

address under the name of Farm Credit Services.

On May 26, 1988, an order was entered herein finding Defendant Tiffany in contempt for violating a prior temporary order prohibiting him from using the name Federal Land Bank of Omaha.

In the 1991 and 1992 Annual Reports of the Defendant corporations filed with the Iowa Secretary of State, Defendant Tiffany is identified was an officer and director of Defendant Production Credit Association of the Midlands, Inc., for both 1991 and 1992. Defendant Tiffany was also listed as an officer and director of Defendant Federal Land Bank of Omaha for 1991, and in 1992 the annual report shows no officers or directors of the corporate entity.

Defendant Tiffany acted on behalf of Defendant Production Credit Association of the Midlands, Inc., when he signed and verified certain Answers to Interrogatories filed on or about July 10, 1992.

Further references to the facts may be made as they relate to the conclusions reached.

CONCLUSIONS

The general rules of summary judgment are well-settled.

As stated by the Court of Appeals in James v. Swiss Valley Ag Service, 449 NW2d 886, 887-88 (Iowa App. 1989):

> Summary judgment is proper when there is no genuine issue of fact and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion,

> summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. In this respect, summary judgment is functionally akin to a directed verdict; every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.
>
> * * * *
>
> When a movant for summary judgment satisfies the initial burden of production, the burden shifts to the party opposing the motion for summary judgment, who then must set forth specific facts showing that there is a genuine issue for trial.

At the outset, the Court notes that the Defendants resistance to the pending motion is untimely.

RCP 237(c) provides that: "Any party resisting the motion shall file within ten days from the time when a copy of the motion has been served a resistance; statement of disputed facts, if any; and

memorandum of authorities supporting the resistance. If affidavits supporting the resistance are filed, they must be filed with the resistance."

The motion was filed on 8-7-92. Defendants' resistance was not filed until 9-30-92. The hearing was held on 10-8-92.

Nevertheless, the resistance will be considered.

I. Iowa Competition Law. At the hearing, defense counsel stated that the Defendants' Seventh Counterclaim is predicated on alleged violations of Iowa Code Chapter 553, the Iowa Competition Law.

Plaintiffs claim that they are exempt from the provisions of Chapter 553 by virtue of Iowa Code Sec 553.6(4), which provides as follows:

> 553.6 Exemptions. This chapter shall not be construed to prohibit:
> 4. The activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or of the United States.

It has been held that this exemption parallels the "state action" exemption under the Sherman Act. Neyens v. Roth, 326 NW2d 294, 298 (Iowa 1982).

It does not benefit the Defendants to argue that the Plaintiffs' activities have not been expressly "approved" by the FCA. The statutory exemption is stated in the disjunctive, approved or regulated. And it is clear that the Plaintiffs' activities are regulated by a regulatory body acting under authority of the United States.

Plaintiffs were created in accordance with the Farm Credit Act of 1971. 12 U.S.C. Sec 2001 et. seq. 12

U.S.C. Sec 2002, entitled "Farm Credit System," provides as follows:

> Section 2002. Farm Credit System. (a) Composition. The Farm Credit System shall include the Farm Credit Banks, the Federal land bank associations, the production credit associations, the banks for cooperatives, and such other institutions as may be part of the System, all of which shall be chartered by and subject to regulation by the Farm Credit Administration. (Emphasis added).

The Farm Credit Adminstration (FCA) is identified in 12 U.S.C. Sec 2241, which states as follows:

> The Farm Credit Administration shall be an independent agency in the executive branch of the Government. It shall be composed of the Farm Credit Administration Board, and such other personnel as are employed in carrying out the functions, powers and duties vested in the Farm Credit Administration by this Act.

See, U.S. v. Fontenot, 33 F. Supp. 629 (D.C. La 1940) (FCA is administrative body of the United States); Renick Bros.

Inc. v. Federal Land Bank Association, 721 F. Supp. 1198 (D.C. Kan. 1989) (FCA given meaningful enforcement powers to require compliance with statutes and regulations).

There are no disputed facts as to Plaintiffs' status as regulated agencies of the United States, which exempts them from the unfair competition scrutiny of Chapter 553.

This result is further supported, if not mandated, by Iowa Code Sec 553.2 which provides as follows:

> This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter. This construction . . . shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.

The "applied laws of the United States" clearly establish that federal

instrumentalities are immune from antitrust regulation.

In Neyens v. Roth, 326 NW2d 294, 297 (Iowa 1982), the Iowa Supreme Court noted that Section 553.2 expressly requires the court to consider federal cases construing the Sherman Act to achieve the legislatively expressed desire for uniformity; and, as stated by the court in Medical Ass'n of State of Ala. v. Schweiker, 554 F. Supp. 955, 966 (N.D. Ala. 1983), it has been uniformly held that:

> The Sherman Antitrust Act's prohibition on the making of agreements in restraint of trade is not applicable to the federal government and its officials acting in their official capacity. (Citations omitted). Similarly, private parties to the extent they are acting at the direction or with the consent of federal agencies also fall outside the pale of the act's prohibition.

See, United States v. Cooper Corp., 312

U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1941); Sea-Land Service, Inc. v. Alaska R.R., 659 F.2d 243 (D.C. Cir. 1981); cert. denied, 455 U.S. 919, 102 S.Ct. 1274, 71 L.Ed. 459 (1982) (Alaska Railroad, entity wholly owned and operated by the United States, remains outside reach of Sherman Act); Champaign-Urbana News Etc. v. J.L. Cummins, 632 F.2d 680 (7th Cir. 1980) (Air Force exchange service was a government instrumentality entitled to immunity under Robinson-Patman Amendments); Sakomoto v. Duty Free Shoppers, Ltd., 613 Supp. 381 (D.C. Guam 1983) (exclusive concession held by Guam Airport Authority was governmental action immune from antitrust scrutiny); Medical Ass'n of State of Ala. v. Schweiker, 554 F. Supp. 955 (M.D. Ala. 1983) (federal officials

administering rural health program are not subject to antitrust liability); Feldman v. Gardner, 661 F.2d 1295 (D.C. Cir. 1981) cert. granted, D.C. Ct. of Appeals v. Feldman, 458 U.S. 1105, 102 S.Ct. 3481, 73 L.Ed.2d 1265 (1982), vacated on other grounds, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) (District of Columbia Court of Appeals exempt from antitrust liability); Webster County Coal Corp. v. T.V.A., 476 F. Supp. 529 (W.D. Ky. 1979) (TVA exempt from liability under antitrust laws since it is a federal instrumentality).

As previously noted, Plaintiffs are federal instrumentalities which, under established case law, are immune from "federal" antitrust scrutiny; and, by virtue of Section 553.2, they should also be immune from "state" scrutiny to

complement and harmonize Section 553.6(4) with the applied laws of the United States. This interpretation results in "uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices." To hold otherwise, i.e., that the Plaintiffs can be liable under state antitrust laws while, at the same time, be exempt from federal antitrust law, would be repugnant to the express purpose of Section 553.2.

II. Injunctive Relief Against Defendant Tiffany. The Court concludes, without hesitation, that a sufficient nexus between Defendant Tiffany and the corporate entities has been shown to warrant inclusion in the injunctive relief previously granted.

Mr. Tiffany originally incorporated

the corporations. He has been in contempt for violating prior order prohibiting him from using the name "Federal Land Bank of Omaha." He has responded under oath to pretrial discovery on behalf of the corporations; and he continues to be listed as a corporate officer on the annual reports filed with the Secretary of State.

There is no "genuine" dispute of material fact regarding the Defendant's connection with the corporate entities he created.

III. Attorney's Authority to Act. Defendants challenge the authority of Plaintiffs' attorney to represent both the Farm Credit Bank and the Associations, claiming that the two have conflicting interests under the federal farm credit legislation.

It is questionable whether the allegation is an "affirmative defense" to the petition, or if the Defendants have standing to complain of dual representation if the represented litigants do not.

In any event, no conflict of interest has been shown. Plaintiffs have a collective interest in prohibiting the use of deceptively similar names.

Defendants have previously argued this issue, and it has been previously rejected.

It is rejected again.

ORDER

IT IS ORDERED that the aforesaid Motion is sustained. Defendants' Seventh Counterclaim and Fourth Affirmative Defense are dismissed.

IT IS FURTHER ORDERED that Defendant

John F. Tiffany is enjoined and restrained from using, for any purpose whatsoever, the names Federal Land Bank of Omaha, Production Credit Association of the Midlands, Federal Land Bank Association of Perry, and Federal Land Bank of the Midlands, Inc., or any other name similar to any farm credit bank or predecessor federal land bank, federal land bank association, or production credit association.

Defendant Tiffany shall forthwith take all action necessary to discontinue the use of such names and expunge the record thereof, including appropriate filings with the Iowa Secretary of State and with all county officials with whom said names have been filed, including but not limited to county recorders, auditors and clerks of court.

Plaintiffs' Motion for Sanctions (3-29-90) and Application for Order to Show Cause (6-17-91) shall be submitted to the presiding Judge in Greene County.

Dated this 27th day of January, 1993.

/s/ Allan L.Goode
Allan L. Goode
Judge of the Second Judicial District

Order (sua sponte) filed Feb 5, 1993
Clerk of District Court for Greene County

On or about the 29th day of January, 1993, an order was filed in the above proceeding which granted the Plaintiff's Motion for Summary Judgment (8-7-92).

On further review, the Court, sua sponte, concludes that the prior order should be modified because the conclusion reached in Division I (Iowa Competitive Law) is erroneous and is not supported by the present record. More specifically,

the Court is not persuaded, as a matter of law, that the record supports the Plaintiffs' claim of immunity under Iowa Code Section 553.6(4).

As the Court understands the Seventh Counterclaim, the Defendants contend that the Plaintiffs have unlawfully entered into a vertical combination to eliminate or reduce competition contrary to the intent of the Farm Credit Act, which allegedly violates the Iowa Competition Law.

Section 553.6(4) exempts and immunizes "the activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or of the United States."

As stated in the earlier ruling, the Iowa Supreme Court has held that this

exemption parallels the "state action" exemption under the Sherman Act. Neyens v. Roth, 326 NW2d 294, 298 (Iowa 1982). Therefore, to claim the benefit of 553.6(4), the principles defining the "state action" concept are applicable.

In Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. (1943), the U.S. Supreme Court held that the Sherman Act was not intended to restrain state action or official action directed by a state; and subsequent decisions recognized that the Parker rationale demanded that the state-action exemption also apply to private parties under certain circumstances. Patrick v. Burget, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed. 83, 91 (1988).

To determine whether anticompetitive conduct engaged in by private parties

should be deemed state action and thus shielded from the antitrust laws, a rigorous two-pronged test is applied: (1) the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; and (2) the anticompetitive conduct must be "actively supervised" by the state itself. Patrick v. Burget, 100 L.Ed.2d at 91; California Dealers v. Midcal Aluminum, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed2d 233, 243 (1980). The general rule is that exemptions from coverage of competition laws are to be narrowly applied. Nevens, 326 NW2d at 298.

The active supervision prong of the test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those failing to accord

with state policy. Id at 92. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. Patrick, 100 L.Ed.2d at 91.

Since the state exemption parallels the federal exemption, the same two-prong test must be satisfied for the Plaintiffs to claim the exemption of 553.6(4) as it relates to their relationship with the federal government.

Essentially, the Plaintiffs are federally-chartered private corporations which are subject to some federal regulation. See, South Cent. Iowa Prod. Credit v. Scanlan, 380 NW2d 699, 701 (Iowa 1986). Although they may be statutorily defined as federal

instrumentalities, that does not change their fundamental character and the two-pronged test must still be satisfied.

Here the record fails to disclose that the alleged anticompetitive conduct is actively supervised by the federal government. Nor is there any evidence, in the language of 553.6(4), that the activities are "expressly regulated" by any regulatory body or officer acting under authority of the United States. Instead, the Plaintiffs simply rely on the provision of 12 U.S.C. Section 2002(a), which states that they are "subject to regulation" by the Farm Credit Administration. There is nothing in the record to show that they are in fact regulated, actively or otherwise. And although the farm credit entities may be subject to some regulation, the mere

presence of some federal involvement or monitoring does not suffice. Patrick v. Burget, 100 L.Ed.2d at 92.

For the reasons stated, the Court believes that the conclusion reached in the prior ruling is wrong, and it should therefore be reversed. Simply put, the Court cannot conclude that the "present" record demonstrates the Plaintiff's entitlement to summary judgment on the basis of immunity under Section 553.6(4).

Similarly, the Court is not convinced that the counterclaim is merely a "generalized" complaint by a disgruntled litigant, although the discovery responses do meander through a wide range of grievances. Cutting through the irrelevant material, the trust of the counterclaim is reasonably specific. Whether it can be proved, or

whether it will constitute a cause of action under the trial record, remains to be seen.

ORDER

IT IS ORDERED that the Plaintiffs' Motion for Summary Judgment on the Defendants' Seventh Counterclaim is overruled. The balance of the prior order remains unchanged.

Dated this 3rd day of February, 1993.

/s/ Allan L.Goode
Allan L. Goode
Judge of the Second Judicial District

Order filed Feb 16, 1993
Clerk of District Court for Greene County

On February 15, 1993, the "Defendants' Counterclaimants' Rule 179 Motion for Enlargement, Amendment and Correction; and for Adjudication of Law Points" in the above action comes before

the Court for submission.

As indicated by the decretal portion of the ruling dated January 27, 1993, the name "Farm Credit Services" is not included in the list of names the Defendants are prohibited from using.

With respect to the Defendants' renewed complaint that they were incorporated as the "Federal Land Bank Association of the Midlands" prior to Plaintiff's merger, the Plaintiff's entitlement to use the name was adjudicated in Judge McMinimee's order of February 8, 1991. The present ruling merely addresses the issue of whether a sufficient nexus has been established to include Defendant John F. Tiffany, individually, in the prohibition.

All other issues in the pending motion, if any exist, should be submitted

to the presiding Judge in Greene County.

ORDER

IT IS ORDERED that the second full paragraph of Page 4 [Begins, "Defendant Production Credit Association of the Midlands, Inc. . . ."] of the Order dated 1-27-93 is stricken. In all other respects, the order remains unchanged, as modified by the Order dated 2-3-93.

Dated this 15th day of February, 1993.

/s/ Allan L.Goode
Allan L. Goode
Judge of the Second Judicial District

Order filed July 6, 1993
Clerk of District Court for Greene County

Hearing was held in this matter on May 24, 1993, on the Plaintiffs' Supplemental Motion for Summary Judgment. The Plaintiffs were represented by their attorney Kevin M. Reynolds. The Defendant

John F. Tiffany was personally present and the Defendants were represented by their attorney Marlyn S. Jensen.

The Court heard the arguments of counsel, has reviewed the file in this matter, and has studied the various briefs filed in the case. Based on the foregoing, the Court is prepared to enter the following ruling.

I. HISTORY OF THE CASE

This is a protracted piece of litigation which was commenced in October of 1987. The only issue presently before the Court is Plaintiffs' claim for summary judgment based upon their asserted affirmative defense of exemption which was raised by the Plaintiffs in their application for leave to amend which was filed and granted in October of 1992.

On January 29, 1993, this Court, the Honorable Allan L. Goode entered an Order granting summary judgment on many of the issues raised in this case. On February 3, 1993, Judge Goode, sua sponte, modified his earlier ruling on the motions for summary judgment and overruled the Plaintiffs' motion for summary judgment on the issue of their assertive affirmative defense of exemption. In his ruling, Judge Goode stated as follows:

"Here the record fails to disclose that the alleged anticompetitive conduct is actively supervised by the federal government. Nor is there any evidence, in the language of 553.6(4), that the activities are "expressly regulated" by any regulatory body or officer acting under authority of the United States. Instead, the Plaintiffs simply rely on the provision of 12 U.S.C. Section 2002(a), which states that they are "subject to regulation" by the Farm Credit Administration. There is nothing in the record to show that they are in fact regulated, actively or otherwise. And although the farm credit entities may

be subject to some regulation, the mere presence of some federal involvement or monitoring does not suffice. Patrick v. Burget, 100 L.Ed.2d at 92."

At this point, the merit of all substantive claims filed by the Plaintiffs have been disposed of except for the Defendants' seventh counterclaim which was filed on October 30, 1989. Defendants' seventh counterclaim alleges that the Plaintiffs are liable for violating Chapter 553 of the Iowa Code, the State's antitrust statute. In that counterclaim, Defendants allege that Plaintiffs have a monopoly and that they have been damaged as a result of this monopoly. In their responsive pleading, Plaintiffs have maintained that there is no monopoly, the Defendants were not damaged, and that the Plaintiffs are immune from state antitrust liability by virtue of Section 553.6(4).

Section 553.6(4), The Code of Iowa provides in part as follows:

> "This chapter shall not be construed to prohibit:
>
> . . .
>
> "4. The activities or arrangements expressly approved or regulated by any regulatory body or officer acting under authority of this state or of the United States."

After Judge Goode entered his supplemental order, the Plaintiffs filed their Renewed Motion for Summary Judgment on March 31, 1993. They also filed a Supplemental Record References and a Supplemental Memorandum Brief on that date. On April 23, 1993, Defendants filed a Renewed Resistance to the Motion for Summary Judgment and their response to Supplemental Memorandum Brief. Thereafter, on May 14, 1993, Defendants filed a Supplement to Resistance and on May 21, 1993, the Plaintiffs filed their

Rebuttal.

It is undisputed that the Federal Land Bank of Omaha ("FLBO") and the Federal Intermediate Credit Bank of Omaha ("FICB") merged on July 6, 1988, and created the Federal Credit Bank of Omaha ("FCBO"). The merger of FLBO and FICB was mandated by Section 410 of the Agricultural Credit Act of 1987.

Prior to the merger, FLBO was a separate federal instrumentality engaged in the business of making primarily first mortgage loans to farmers secured by first mortgage liens against the farm real estate. See, 12 U.S.C. Section 2014, prior to the amendment by Section 401 of the Ag. Credit Act of 1987; and 12 U.S.C. Section 2015(a).

FICB, prior to the merger, was a separate federal instrumentality engaged

primarily in the business of discounting notes representing loans made by local production credit associations to farmers. See, 12 U.S.C. Section 2074, prior to amendment by Section 401 of the Ag. Credit Act of 1987; and 12 U.S.C. Section 2015(b). The local production credit associations originated the loans with farmers. Id.

The earlier ruling of the Court on the motion for summary judgment, requires the Plaintiffs to prove the exemption under Iowa Code Section 553.6(4). In that ruling of February 4,1993, Judge Goode identified a two-prong test for such determination. The first prong of the test was that the challenged restraint must be one clearly articulated and affirmatively expressed as federal policy. The second prong of the test was

that the alleged anticompetitive conduct must be "actively supervised by the federal government itself."

In regard to the first prong of the test, Section 410 satisfies this. Section 410 clearly articulates and affirmatively expresses the federal government's policy that the Federal Land Bank and the Federal Intermediate Credit Bank and each farm credit system district should move.

Additionally, the second prong of the test is met under both Section 410 and the regulation of the FCA. Section 410(a) expressly provides that the plan of merger between the FLBO and the FICB was subject to approval by the FCA, an agency of the United States government. See, 12 U.S.C. Sections 2241-2259 and 12 C.F.R. Sections 600.2 and 600.3

Additionally, as shown by the FCA approval letter, the FCBO charter amendment and the FCBO merger affidavit contained in the supplemental record references, the FCA specifically reviewed and approved the merger of FLBO and FICB to create FCBO.

As such, the undisputed record in this case establishes that the Plaintiffs are immune under Iowa Code Section 553.6(4) from any liability under the Iowa competition law based upon the merger of FICB and FLBO into FCBO.

Secondly, the resulting combination of the merger is exempt from liability under the Iowa competition law under Section 553.6(4), The Code of Iowa.

Sections 2279c-1 and Section 2279f-1 clearly express the federal government's policy that the local PCA's within the

same district and the local FLBA's within the same district should merge.

Also, these same sections satisfy the "active supervision" prong of the test because the mergers must be, and in fact, were approved by the FCA and/or the Farm Credit Administration Board. Both of these are agencies of the United States government.

12 U.S.C. Section 2241 provides as follows:

> "The Farm Credit Administration shall be an independent agency in the executive branch of the government. It shall be composed of the Farm Credit Administration Board and such other personnel as are employed in carrying out the functions, powers and duties vested in the Farm Credit Administration by this act."

Additionally, 12 U.S.C. Section 2242 sets forth that the FCA is to be managed by the FCAB and that the FCAB consists of three members appointed by the President

with the advice and consent of the Senate.

As established by the Supplemental Record References, the uncontroverted facts in this case demonstrate that the FCA actively supervised the merger of the local PCA's and the local FLBA's. See, the PCAM merger affidavit, PCAM-FCA approval, and PCAM charter amendment. These detailed regulations demonstrate that the FCA supervises such mergers.

The law concerning summary judgment is well-known.

The purpose of summary judgment is to avoid a trial where no genuine issue of material fact exists. See Amco Insurance Co. v. Stammer, 411 N.W.2d 709, 711 (Iowa App. 1987) and Diamond Products Co. v. Skipton Painting and Insulation, Inc., 392 N.W.2d 137, 138

(Iowa 1986).

Summary Judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See First National Bank in Fairfield v. Kenny, 454 N.W.2d 339, 341 (Iowa 1987).

An issue of fact is "material" only when the dispute is over facts that might effect the outcome of the suit, given the applicable governing law. See Junkins v. Branstad, 421 N.W.2d 130, 132 (Iowa 1988). The requirement of "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. See Junkins, supra, and Jones v. Palmer Communications Inc., 421 N.W.2d 130, 132 (Iowa 1988).

In ruling on a motion for summary

judgment, the Court's function is to determine whether such a genuine issue exists, not to decide the merits of one which does. Daboll v. Hoden, 222 N.W.2d 727, 731 (Iowa 1974); Matter of Estate of Henrich, 389 N.W.2d 78, 80 (Iowa App. 1986).

The burden of showing the non-existence of a material fact is upon the moving party. See Behr, supra.

The Iowa Supreme Court in Behr adopted the federal standard for summary judgment as set out in Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 244, 106 S.Ct. 2505, 2508, 91 L.Ed.2d 202, 209 (1986). The U.S. Supreme Court there held:

> "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict.

> Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial."

477 U.S. at 256, 106 S.Ct. at 2514, 91 L.Ed.2d at 217.

Once a defendant has properly pled and supported its motion for summary judgment with a statement of undisputed facts the burden shifts. "Under rule 237, the burden then shift[s] to plaintiff to produce or present specific, material facts to show that there is a genuine issue of material fact. See Behr, 414 N.W.2d at 342; Martinko [v. H-N-W Associates], 393 N.W.2d 320, 321 (Iowa 1986); Anderson 477 U.S. at 257, 106 S.Ct. at 2514, 91 L.Ed.2d at 217." James v. Swiss Valley Ag Service, 449 N.W.2d 336, 888 (Iowa App. 1989).

In order to rule upon a motion for summary judgment, the court must examine the entire record before it, including the pleadings, admissions, depositions, answers to interrogatories, and affidavits, if any. See Matter of Estate of Henrich, 389 N.W. 78, 80 (Iowa App. 1986).

While an adverse party generally cannot rest upon his pleadings when the moving party has supported his motion, summary judgment is still not proper if reasonable minds could draw different inferences and conclusions from the undisputed facts. See Behr, supra.

The resisting party must set forth specific facts showing there is a genuine issue for trial. The resisting party may not rely solely on legal conclusions to show there is no genuine issue of

material fact justifying denial of summary judgment. See Amco, supra, Schuling v. Tiffey, 454 N.W. 899, 900 (Iowa 1990), and IRCP 237(e).

Summary judgment is functionally akin to a directed verdict; every legitimate inference that can reasonably be deduced from the evidence should be afforded the non-moving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved. See Behr, supra.

Based upon the foregoing principles, the undisputed facts in this record establish that the alleged violation of vertical combinations asserted by the Defendants in their seventh counterclaim are exempt from liability under Iowa Code Section 553.6(4). As a result, Plaintiffs are entitled to judgment as a matter of

law on Defendants' seventh counterclaim.

IT IS THEREFORE THE ORDER OF THE COURT that Plaintiff's Supplemental Motion for Summary Judgment is SUSTAINED and the Defendants' seventh counterclaim is DISMISSED.

Dated this 2nd day of July, 1993, in the Greene County Courthouse in Jefferson, Iowa.

/s/ Timothy J. Finn
Timothy J. Finn
District Court Judge

Order filed August 4, 1993
Clerk of District Court for Greene County

Counterclaimant has filed two motions following the Court's Ruling on Plaintiffs' Supplemental Motion for Summary Judgment which was filed on July 6, 1993.

Both the Motion for New Trial and the Rule 179(b) motion seek to change the Court's ruling on the summary judgment

issue. They are simply a reiteration of earlier arguments made to the Court. They amount to nothing more than an argument with the Court expressing the Counterclaimant's disagreement with the ruling of the Court.

The proper manner for the Counterclaimants to proceed if they believe the Court is in error is to appeal. The Court has carefully considered both the Motion for New Trial and the Rule 179(b) motion and determines that they are without merit and should be denied, without hearing.

IT IS THEREFORE THE ORDER OF THE COURT as follows:

1. The Counterclaimant's Motion for New Trial on Decision Filed July 6, 1993, is OVERRULED.

2. The Counterclaimant's 179(b) For

Expanded Ruling is DENIED.

3. The hearing continued on a Motion for Protective Order is now CANCELLED, the same being moot.

Dated this 3rd day of August, 1993.

/s/ Timothy J. Finn
Timothy J. Finn
District Court Judge

Filed March 29, 1995
Clerk Iowa Supreme Court

IN THE SUPREME COURT OF IOWA
NO. 43 / 93-1308

JOHN F. TIFFANY, ET. AL., APPELLANTS.

"Appeal from the Iowa District Court in and for Greene County, Louie F. Beisser, Gary L. McMinimee, Allan L. Goode, and Timothy J. Finn, Judges.

Appeal from summary judgment for plaintiffs in action to enjoin use of Plaintiffs' names. AFFIRMED.

* * * *

IV. The Anticompetition Counterclaim.

The district court dismissed Tiffany's counterclaim alleging that the plaintiffs had violated the Iowa Competition Law by establishing an agricultural lending monopoly. See Iowa Code ch 553.

The plaintiff's summary judgment motion raised several issues in connection with this claim, including the one that is dispositive of the issue: that the plaintiffs are exempt under Iowa Code section 553.6 which provides:

> This chapter shall not be construed to prohibit:
>
> 4. The activities or arrangements expressly approved or regulated by any regulatory body or officer action under authority of this state or of the United States.

Our court has construed the Section 553.6(4) exemption on previous occasions. See Northwestern Bell Tel. Co. v. Iowa Utils. Bd., 477 N.W.2d 678, 684-8 6 (Iowa 1991)(state fiber-optic network is exempt); Pfiffner v. Roth, 379 N.W.2d 357, 360 (Iowa 1985) (cities not exempt under section 553.6(4); Neyens v. Roth, 326 N.W.2d 294, 298-99 (Iowa 1982)(city ambulance service not exempt under

section 553.6(4).

This case must be distinguished from these cases because farm credit banks are 'federally chartered instrumentalities of the United States' and subject to regulation by the federal farm credit administration. 12 U.S.C. Section 2011(a), 2013. Federal instrumentalities have been accorded special treatment under the cases. For example, they have been held to be exempt from certain state taxes, e.g., Federal Land Bank v. Board of County Comm'rs, 368 U.S. 146, 149, 82 S.Ct. 282, 285, 7 L.Ed.2d 199, 202-03 (1961), and to be immune from certain state tort cases, e.g., Slotten v. Hoffman, 999 F.2d 333, 335-37 (8th Cir 1993)(member of farm credit system).

It has been expressly held that farm credit banks, as "federal

instrumentalities," are not subject to the federal antitrust law. See Schroder v. Volcker, 646 F.Supp 132, 136 (D. Colo. 1986), aff'd, 864 F.2d 96, 99 (10th Cir. 1988).

When determining whether farm credit banks are entitled to an exemption under our competition law, we are guided by section 553.2, which states:

> This chapter shall be construed to complement and be harmonized with the applied laws of the United States which have the same or similar purpose of this chapter. This construction shall not be made in such a way as to constitute a delegation of state authority to the federal government, but shall be made to achieve uniform application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices.

Because these plaintiffs would be entitled to exemption under the federal antitrust act and because Iowa Code section 553.2 prescribes a "uniform

application of the state and federal laws prohibiting restraints of economic activity and monopolistic practices," we conclude that section 553.6 should be interpreted to provide an exemption to these plaintiffs.

The defendants have raised several additional issues, which we have not discussed. We have considered each of them, however, and find that none of the issues raised on appeal constitute reversible error. Accordingly, we affirm the district court.

AFFIRMED."

Filed April 26, 1995
Clerk Iowa Supreme Court

IN THE SUPREME COURT OF IOWA
NO. 93-1308

JOHN F. TIFFANY, ET. AL., APPELLANTS.

"After consideration by the court,

en banc, Harris, J., taking no part, appellants' Petition for Rehearing in the above-captioned case is hereby overruled and denied."